89-236

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COASTAL PETROLEUM COMPANY,

Petitioner

v.

INTERNATIONAL MINERALS & CHEMICAL CORPORATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Caribbean Oils & Minerals, Ltd.
is the parent of Coastal
Petroleum Company.

QUESTIONS PRESENTED

1. (a) Where the substantive law of Florida on the subject involved in this multi-billion dollar diversity case was uncertain, and the Florida certification statute provided an appropriate mechanism to determine the law of Florida, was it error for the Eleventh Circuit to refuse to certify the issue to the Florida Supreme Court and instead to affirm the summary judgment below which was based on speculation as to Florida law?

(b) Should not this Court itself utilize the Florida statute and certify to the Florida Supreme Court the issue of the construction of a drilling lease issued by the State Board of Trustees?

2. Is it not a violation of Rules 2, 8 and 54(c) of the Federal Rules of Civil Procedure for the Eleventh Circuit to affirm a grant of summary judgment against plaintiff on the entire case, when only one theory of claim was considered and there were other bases of claim available to plaintiff which were not in any way implicated by the Court's view of the first theory?

PARTIES BELOW

The parties are listed in the caption: Coastal Petroleum Company and International Minerals & Chemical Corporation.

Although initially joined as parties in the District Court, the United States of America and the United States Army Corps of Engineers were dismissed. The Florida Board of Trustees of the Internal Improvement Trust Fund now do not make any claim in this case. None of these parties participated in the proceedings before the United States Court of Appeals for the Eleventh Circuit.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Coastal Petroleum Company petitions this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The 17 page District Court decision is unreported. The District Court's Final Order is reprinted at Appendix B.

The unreported decision per curiam affirming the District Court decision held:

> "The judgment appealed is affirmed for the reasons stated in the Final Order of the United States District Court entered in this matter on August 12, 1988 and found at ___ Fed. Supp. ____."

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The opinion of the United States Court of Appeals for the Eleventh Circuit was rendered on April 10, 1989 (appended at Appendix A herein). A timely suggestion for rehearing in banc, pursuant to Rule 35, Rules of Appellate Procedure, and Local Rule 11th Cir. R.35-6, Rules of the United States Court of Appeals for the Eleventh Circuit, was denied on May 15, 1989 (appended at Appendix E herein).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Article V, Section 3.(b)(6) of the Florida Constitution:

> "(b) JURSIDICTION.—The supreme court:
>
> May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida."

Florida Rule of Appellate Procedure 9.150(a):

> "(a) Applicability. Upon either its own motion or that of a party, the Supreme Court of the United States or the United States Court of Appeals may certify a question of law to the Supreme Court of Florida whenever the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida."

Federal Rule of Civil Procedure 2:

> "There shall be one form of action to be known as 'civil action'."

Federal Rule of Civil Procedure 8(f):

> "Construction of Pleadings. All pleadings shall be so construed as to do substantial justice."

Federal Rule of Civil Procedure 54(c):

> "Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings."

STATEMENT OF THE CASE

This case and six related cases collectively are the largest private commercial litigation in the history of the United States, involving actual hard damages in billions of dollars. This litigation involves the wrongful taking of minerals from lands within Coastal Petroleum Company's leases.

The claim for taking of minerals was filed in the United States District Court for the Northern District of Florida pursuant to diversity and federal question jurisdiction. Coastal Petroleum Company is a Florida corporation, IMC a New York corporation. In a prior interlocutory appeal, the United States Court of Appeals for the Eleventh Circuit determined that diversity jurisdiction was present but that federal question jurisdiction was not present. *Coastal Petroleum Company v. International Minerals & Chemical Corporation,* 695 F.2d 1314 (11th Cir. 1983).

The case proceeded toward trial through motions and discovery over a period of nine years. Finally, after a two-year stay awaiting a decision by the Florida Supreme Court in a related case, *Coastal Petroleum Company v. American Cyanamid Company,* 492 So.2d 339 (Fla. 1986), the District Court scheduled trial and lifted the stay. After almost ten years of trial preparation, IMC suddenly filed a motion for summary judgment raising a new issue never mentioned before, suggesting that Coastal did not have a sufficient interest as an exclusive lessee in Florida to assert a claim. No Florida case has addressed the issue of whether an exclusive lessee under a drilling lease granted by a State Board may sue a third party who takes minerals from the leasehold. The District Court guessed at the answer to this state law issue and granted the summary judgment. The United States Court of Appeals for the Eleventh Circuit, in a two line unpublished decision, per curiam affirmed, and denied Coastal's motion for rehearing and motion to certify the late-raised, uncertain, determinative state law defensive issue to the Florida Supreme Court.

Coastal is the exclusive lessee of lands in central Florida's mineral district. Its 1947 oil, gas and mineral Florida State Lease No. 224-B, which covers nearly two million acres of Florida, included areas now found to be extensively mined by IMC and other mineral companies. Since the lease was granted by the State of Florida Board of Trustees of the Internal Improvement Trust Fund, Coastal has spent millions of dollars on rentals, exploration and other expenses to find oil, gas and minerals on the leases.

During the intervening forty years, Florida and Federal litigation has defined the contours of this state drilling lease protecting Coastal from encroachment, *Coastal Petroleum Company v. Bryant,* Case No. 18569 (Leon County Circuit Court 1963; *Collins v. Coastal Petroleum*

Company, 118 So.2d 796 (Fla. 1st DCA 1960), cert.discharged, 125 So.2d 300 (Fla. 1960); establishing the inclusion of minerals, *Collins v. Coastal Petroleum Company,* 118 So.2d 796 (Fla. 1st DCA 1960), cert.discharged, 125 So.2d 300 (Fla. 1960); and even granting compensation to Coastal when portions of the leased areas were condemned for a Federal bird preserve, *United States v. Certain Lands in Citrus County, Florida,* Case No. 162 (S.D. Fla. 1954). Coastal's lessor, the Florida Board of Trustees, has even stipulated in a case that the mineral involved is a mineral within Coastal's lease, *Burns v. Coastal Petroleum Company,* 194 So.2d 71 (Fla. 1st DCA 1966).

This matter was determined on summary judgment but the factual inferences favorable to Coastal were brought to the attention of the Court in the record. In 1961, Coastal asked IMC to assist it in mining any minerals located upon Coastal's leases in the central Florida mineral district. Unknown to Coastal, IMC and other companies engaged in a deceit, telling Coastal no mineable minerals existed on the leases. In fact, as one letter establishes, the companies knew Coastal's leases contained such minerals, that they had mined them, that they would have to pay damages if Coastal found out, and that the deceit should be continued. Even IMC expected to have to pay damages if Coastal found out about its mining on the leases lands. The "black eye" document even stated:

> "What are damages if we take someone else's minerals wrongly. Value of minerals? Or do we have to put land back? they could get an injunction. how long would that take? Would we get black eye?"

When these facts came to Coastal's knowledge in 1977, during discovery in a related case on a different claim, Coastal, a Florida corporation, filed suit against IMC, a New York corporation, in the United States District Court

in Tallahassee, Florida. Motions, discovery and trial preparation continued for nearly nine years until trial was set in 1986 following a significant decision by the Florida Supreme Court, *Coastal Petroleum Company v. American Cyanamid Company,* 492 So.2d 339 (Fla. 1986). The District Court allowed the filing of one last round of motions. One motion sought summary judgment for a new reason, namely that as a lessee, Coastal did not have a sufficient interest to claim damages against a third party for taking of minerals from its lease. That issue of Florida law has not been addressed by Florida courts, so the District Court guessed at the uncertain determinative issue of the case. On August 16, 1988, the District Court granted that motion for summary judgment.

In the appeal before the United States Court of Appeals for the Eleventh Circuit, Coastal submitted that this late-raised, uncertain, determinative issue of Florida law should be certified to the Florida Supreme Court pursuant to the enabling Florida laws, Article V, Section 3(b)(6), Florida Constitution, and Rules 9.030(a)(2)(c) and 9.150, Florida Rules of Appellate Procedure. Coastal also submitted that without regard to whether Coastal's complaint stated a claim using one legal theory, the facts pleaded and record therein required other relief or alternative theories consistent with Rules 2, 8(f) and 54(c). The United States Court of Appeals for the Eleventh Circuit affirmed in a per curiam unpublished three line decision (Appendix A), denied the motion to certify to the Florida Supreme Court (Appendix D), and denied rehearing (Appendix E).

REASONS FOR GRANTING THE WRIT

1. (a) In This Multi-billion Dollar Diversity case, the Important, Uncertain and Determinative State Law Question Should Have Been Certified to the Florida Supreme Court.

Rather than relying upon a District Court's guess at an important question of Florida law, Florida has made provisions to avoid the necessity for guessing and the resulting embarrassment and injustice that could result from an erroneous guess. The United States Circuit Court for the Eleventh Circuit should have certified the issue of Florida law to the Florida Supreme Court which could guarantee that indisputably correct Florida law was applied. The uncertain but determinative question of Florida law involved is:

> **WHETHER UNDER FLORIDA LAW AN EXCLUSIVE LESSEE OF A STATE LEASE GRANTED UNDER CHAPTER 20680, FLA. LAWS (1941), HAS A SUFFICIENT INTEREST TO BRING AN ACTION AGAINST A THIRD PARTY TRESPASSER WHO MINES AND TAKES MINERALS FROM THE LEASED AREA?**

One would expect the answer to be "yes." The 1989 NCBE Multi-state Bar Examination sample question one says "yes" to a very similar question. The District Court and Circuit Court, however, both held Florida law to preclude suit by the exclusive lessee. The Florida Supreme Court has never addressed this determinative question and denied an exclusive lessee any remedy against a third party trespasser who takes minerals from its lease.

This case involves literally billions of dollars of damages and what are believed to be the largest leases in the United States, yet after nine years of trial preparation and two trial settings the case was disposed of by summary judgment premised upon a case that did not even address the question. The decision impacts not merely the large state leases of Coastal but also the other state and private leases in Florida and potentially other states. The decision essentially "licenses" third party trespassers to take minerals from exclusive leases of others. Coastal respectfully submits this important, uncertain, determinative question of Florida law should be certified to the final determinor of Florida state law, the Florida Supreme Court.

Since this Court's decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), Federal courts in diversity cases have applied the substantive law as declared by the highest state court. This case now before this Court involves the *Erie* problem, that is, the state law is novel and uncertain and offers opportunity for guessing, error, embarrassment and injustice. Though not entirely uncommon in diversity cases, the *Erie* problem becomes more acute as the importance of the question increases as in this case.

In 1960, a solution to the *Erie* problem was discovered and applied by this Court—certification by the Federal courts to the state's highest court. In *Clay v. Sun Insurance Office Limited*, 363 U.S. 207 (1960), the Court held:

> "The Florida Legislature, with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision. Fla.Stat.Ann., 1957, §25.031. . . . Vacated and remanded."

Florida proceeded to further implement the certification procedure by Appellate Rules. Other states adopted similar provisions and a great deal of guessing, error, embarrassment and injustice has been avoided. Brown, **Certification—Federalism in Action,** 7 Cum.L.Rev. 455, 456 (1977), and Roth, **Certified Questions from the Federal Courts: Review and Re-proposal,** 34 U.Miami L.Rev. 1 (1979).

As Judge John R. Brown has written:

> "It has been awkward—and, to some, not a little embarrassing—when our first guess turns out to be wrong and the state court makes the second and last guess by reversing our holding.[2] But more important than possible embarrassment is the frustration for litigants when the rule of law we prescribe turns out to be a ticket for one ride only. There is no certainty in the judicial system where a federal court decision has both res judicata and collateral estoppel effect on the particular parties to the litigation but due to subsequent state decision to the contrary has no stare decisis effect.
>
> 2. Food Fair Stores, Inc. v. Trussell, 131 So.2d 730 (Fla. 1961), *expressly disapproving* Pogue v. Great Atl. & Pac. Tea Co., 242 F.2d 575 (5th Cir. 1957); Truck Ins. Exch. v. Seelbach, 161 Tex. 250, 339 S.W.2d 521 (1960), *expressly rejecting* National Sur. Corp. v. Bellah, 245 F.2d 936 (5th Cir. 1957); Felmont Oil Corp. v. Pan Am. Pet. Corp., 334 S.W.2d 449 (Tex Civ. App. 1960), *expressly refusing to follow* Sinclair Oil & Gas Co. v. Masterson, 271 F.2d 310 (5th Cir. 1959)."
>
> Brown, **Certification—Federalism In Action,** 7 Cum. L. Rev. 455, 456 (1977).

Refusal to certify, while perhaps expedient, has a record of embarrassment and a wake of erroneous and unjust final determinations.

This Court has held that the decision to certify is within the discretion of the Circuit Courts.

> "We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court." *Lehman Brothers v. Schein,* 416 U.S. 386, 390, 391 (1974).

The Court has never defined the limits of that discretion. The Court, however, has reversed and remanded a case ordering reconsideration of certification where the lower court based its decision on deduction "eminations from other Florida decisions." *Lehman Brothers v. Schein,* 416 U.S. 386, 389 (1974). And see: *Bellotti v. Baird,* 428 U.S. 132 (1976).

Certainly the limits of discretion must close as the importance of the question increases. For example, if the determination will likely affect other parties' interests, cause immediate related repercussions, affect substantial interest or lead to further litigation, the importance of the determination increases as does the need for certification and the breadth of discretion narrows.

Though many of the cases which have warranted certification involved direct construction of state statutes, many did not. *Hale v. Ford Motor Credit Company,* 581 F.2d 111 (5th Cir. 1978); *Bernard v. Florida East Coast Railway Company,* 624 F.2d 552 (5th Cir. 1980); *Green v. American Tobacco Company,* 304 F.2d 70 (5th Cir. 1962); *Delahanty v. Hinckley,* 845 F.2d 1069 (DC Cir. 1988).

Even the Circuit Court itself has held that:

> "Ordinarily when a new theory of liability is asserted and there is no decision by the state court dispositive of the proposition of law, this court certifies the question to the State Supreme Court for resolution. See Green v. America Tobacco Company, 304 F.2d 70, 86 (5th Cir. 1962)." *Evers v. General Motors Corp.*, 770 F.2d 984, 985 (11th Cir. 1985).

Although no Florida Supreme Court case answered this issue of law or claim of liability, the Circuit Court refused to certify the issue to the Florida Supreme Court. In fact, in similar situations the Circuit Court *has* certified questions to the state courts: *Insinga v. Labella*, 845 F.2d 249 (11th Cir. 1988), dealt with corporate negligence doctrines; *Scott v. Board of Trustees of Mobile Steamship Association*, 815 F.2d 653 (11th Cir. 1987), dealt with common law marriage and insurance; *Dorse v. Armstrong World Industries, Inc.*, 798 F.2d 1372 (11th Cir. 1986), dealt with strict products liability; and *Wammock v. Celotex Corp.*, 793 F.2d 1518 (11th Cir. 1986), dealt with availability of punitive damages. The Circuit Court failed to certify the issue here, however.

The Courts below guessed at the answer to this question, confidently relying upon *Miller v. Carr*, 193 So. 45 (Fla. 1940), which did not involve a taking of minerals by any third party. That case involved an estate contest over future oil royalties. There is no case where the Florida Supreme Court has addressed the two questions of Florida law stated above. No Florida Supreme Court case holds that an exclusive lessee does not have a sufficient interest to bring an action against a third party trespasser who mines minerals from a leased area. This question of Florida law is determinative and there is no controlling precedent of the Supreme Court of Florida.

Unless the Court constrains the scope of discretion to certify to include such cases, then this important, novel and determinative Florida law question, and other such important ones, will not be addressed in the first instance by states. The state leases here are believed to be the largest leases in the United States. This claim here and related claims involve billions of dollars of mined minerals and are probably among the largest claims in the history of the United States. The Fifth Circuit Court of Appeals has even previously certified questions to the Florida Supreme Court concerning these leases. *Coastal Petroleum Company v. Secretary of the Army,* 489 F.2d 777 (5th Cir. 1973). The lands are even the sovereignty lands of the State of Florida. The Florida Supreme Court recently favorably considered related issues in *Coastal Petroleum Company v. American Cyanamid,* 492 So. 2d 339 (Fla. 1986). Furthermore, there are many other state leases and private leases which will be dramatically affected by the decision. This is not a minor litigation but is of tremendous importance and moment to these parties and the people of Florida. If this Court does not intervene and constrain the exercise of discretion to include such questions, this Court's discovery of a solution to the *Erie* problem will be ignored.

This is not an isolated or unique situation. There are five other similar cases pending before the lower court. In three the Trustees of the State of Florida assert a similar claim for damages from sovereignty lands on the same rivers. Furthermore, other lessees who have expected that their interests are protected have borrowed and pledged their interest to banks and other entities, yet the effect of the decision here would mean no such interest exists.

The potential for a headline reading "Thief Prevails with Billions of Dollars Due to Eleventh Circuit Error" or "Industry Turmoil Ends as Florida Supreme Court Corrects Eleventh Circuit Error" is avoided by certification. Such cases should be certified, as this Court has held before. The potential embarrassment, unfairness and error can be completely avoided by certifying this determinative novel issue of Florida law to the Florida Supreme Court.

In refusing to certify the uncertain, determinative issue of Florida law to the Florida Supreme Court, the Circuit Court has departed far from the accepted and usual course of federal diversity proceedings involving such important issues. As the Fifth Circuit Court held in *Martinez v. Rodriquez*, 410 F.2d 729, 730, 731 (5th Cir. 1969):

> "There are, to be sure, purists who somehow feel that a struggle of uncertainty leading even to the likelihood of an erroneous but speedy result is better than the slight time it takes to get an authoritative answer. But so long as Florida is with us and has this responsive mechanism that not only lights our lights but keeps us straight at the same time, this tribunal is grateful for the substitution of the certainty for the sometimes scholastic, always uncertain, exploration into what the local Judges would say they would say the local law is."

1. (b) This Court Should Itself Directly Certify This Issue to the Florida Supreme Court.

There is little question but that the Court has the authority to directly certify questions to the Florida Supreme Court. *Lehman Brothers v. Schein*, 416 U.S. 386, 390 (1974). As this Court has stated in that case at page 391,

the certification procedure, in the long run, saves time, energy and resources and helps to build a cooperative judicial federalism.

Coastal Petroleum Company is the exclusive lessee of a state lease issued pursuant to Chapter 20680, Florida Laws (1941). The question whether this statutory lease included the right to sue third party trespassers who take minerals from the leasehold is the type of issue that has been certified by this Court on prior occasions. In *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963), the question concerned the jurisdiction of Florida courts, which is governed by statute. *Aldrich v. Aldrich*, 375 U.S. 249 (1963), dealt with a question concerning probate and divorce laws of Florida. In *Elkins v. Moreno*, 435 U.S. 1647 (1978), the issue concerned whether non-immigrant aliens could become domiciles of Maryland. And in *Virginia v. American Booksellers Association, Inc.*, 484 U.S. ____, 98 L.Ed.2d 782, 108 S.Ct. ____ (1988), the certification to Virginia concerned the reach of the language of the statute.

To obtain the determinative answer to this question will thrust the controversy and the entire storm surrounding this litigation and the issue to a conclusion. Coastal respectfully submits this Court should certify the question to the Florida Supreme Court.

2. To Deny Any Relief on the Basis of a Single Legal Theory When Alternative Legal Theories are Supported by the Record Violates Rules 2, 8 and 54(c) of the Federal Rules of Civil Procedure.

The decision of the United States Court of Appeals for the Eleventh Circuit applies Federal Rules of Civil Procedure 2, 8(f) and 54(c), in conflict with the decisions of this Court and other Circuit Courts. The decision also sanctions a radical departure by the lower court from the usual

and reasonable practice of Federal courts. The Circuit Court affirmed a summary judgment premised upon one legal theory where the pleaded facts and record supported relief upon legal theories unaffected and unaddressed by the court. This decision must be reconciled with Rules 2, 8 and 54(c) or this serious contagious precedent may undercut the entire substantive premise of the Federal Rules.

As Coastal argued to the Circuit Court:

> "Coastal argued before the District Court that:
>
> > 'Rule 2, Fed.R.Civ.P., recognizes "one form of action." Further, all pleadings are construed as to substantial justice. Rule 8(f), Fed.R.Civ.P. Some relief must be available to remedy this wrong.'(R29-654-5)
>
> At least two other forms of relief were available to Coastal, neither of which required a demonstration of any possessory interest: an equitable action for an accounting as a result of a constructive trust, and a cause under Chapter 77-342, Laws of Florida (1977)." Brief of Appellant, p. 39,40.

While the Complaint was cast as an action under one legal theory, for the possessory remedy of conversion, the facts supported by the record entitled Coastal to relief upon at least two other non-possessory theories, one for statutory theft and one for common law accounting.

Most Circuits and this Court have held that the pleaded facts supported by the record control and not the non-availability of a pleaded legal theory. The Ninth Circuit in *Electrical Construction & Maintenance Company, Inc. v. Maeda Pacific Corporation*, 764 F.2d 619, 622 (9th Cir. 1985), held:

> "A party does not need to plead specific legal theories in the complaint, as long as the opposing party receives notice as to what is at issue in the lawsuit. American Timber & Trading Co. v. First National Bank of Oregon, 690 F.2d 781, 786 (9th Cir. 1982). Furthermore, '[i]t has long been established law that, in equity, a plaintiff is entitled to any relief appropriate to the facts alleged in the bill and supported by the evidence, even where he has not prayed for such relief.' Dann v. Studebaker-Packard Corporation, 288 F.2d 201, 216 (6th Cir. 1961) (citing Bemis Bros. Bug Co. v. United States, 289 U.S. 28, 34, 53 S.Ct. 454, 77 L.Ed. 1011 (1933)."

In *Carbone v. Gulf Oil Corporation,* 812 F.2d 1416, 1420 (Temp. Emergency Court of Appeals 1987), that Court considered the "cause of action" concept sanctioned by the Circuit Court here and held:

> "The application of the 'cause of action' concept (and the associated theory of the case and election of remedies doctrines) was deliberately, expressly and clearly eliminated in federal procedure in 1938 when the Federal Rules of Civil Procedure (F.R.Civ.P.) became effective. Rule 2, F.R.Civ.P., which expressed in a few words the officially and repeatedly expressed determination to abolish the 'cause of action' concept as well as the from of action and the associated theory of the case and election of remedies doctrine. Every authoritative work on federal civil procedure emphasizes the abolition of these procedural, and sometimes decisive, concepts of the past. For example, see: 4 Wright and Miller, Federal Practice and Procedures, Civil, §§1041–1045; 2 Moore's Federal Practice, §§2.04–2.06."

In *Newman v. Silver,* 713 F.2d 14, 15 (2d Cir. 1983), the court rejected any reading of Rule 8 that focused upon legal theories instead of statements of claim, regardless of whether that particular theory is mentioned. The Fifth Circuit in *Dussoy v. Gulf Coast Investment Corporation,* 660 F.2d 594, 604 (5th Cir. 1981), held:

> "The form of the complaint is not significant if it alleges facts upon which relief can be granted, even if it fails to categorize correctly the legal theory giving rise to the claim."

Also see *Rohler v. TRW, Inc.,* 576 F.2d 1260 (7th Cir. 1978).

Even pleading an improper theory is not a basis to deny relief. *Doss v. South Central Bell Telephone Company,* 834 F.2d 421 (5th Cir. 1987); *Janke Construction Company, Inc. v. Vulcan Materials Company,* 527 F.2d 772 (7th Cir. 1976); *Johnson v. U.S.,* 547 F.2d 688 (DC Cir. 1976); and *Doe v. United States Department of Justice,* 753 F.2d 1092 (DC Cir. 1985).

Not only does the Circuit Court's ruling sanction this departure from Rules 2 and 8, but it also sanctions a similar departure from Rule 54(c) which provides for the proper relief whether asked for or not. *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60 (1978). Here Coastal prayed for such other relief as may be proper, yet while the Courts found no possessory remedy available, they ignored the nonpossessory relief available. This conflicts with other Circuit Court decisions.

In *Kirby v. United States Government Department of Housing and Urban Development,* 745 F.2d 204, 207 (3rd Cir. 1984), the Court held:

> "Closely related to the mootness issue here is Federal Rule of Civil Procedure 54(c), which provides in part that in a non-default case a 'final judgment shall grant the relief to which the party

> in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.' **The rule requires that a court ascertain whether the plaintiffs are entitled to any remedy, not whether they have asked for the proper remedy.** As long as the plaintiffs have stated a claim for relief, it is the court's obligation to grant the relief to which the prevailing party is entitled whether it has been specifically demanded or not." (Emphasis added.)

Yet in this case the Circuit Court sanctioned a denial of any relief just because one of alternative legal theories was not available.

In another Circuit, *Sherman v. Hallbauer,* 455 F.2d 1236, 1242 (5th Cir. 1972) the Fifth Circuit Court considered and reversed a summary judgment entered upon the main legal theory advanced by the plaintiff where an alternative legal theory was available:

> "We must therefore conclude that the district court excluded the Shermans's memorandum from the catalog of items which it considered in passing upon the motion for summary judgment. **The legal theory advanced in that memorandum for interpreting the emerging facts furnished a basis for denial of summary judgment and at least a trial of the action against Hallbauer based on contract.** True, the Shermans advanced the contractual theory late in the day.
>
> It is true too that the Shermans's lawyer consumed no small amount of the court's valuable time in insisting upon his misrepresentation theory of the case." (Emphasis added.)

Similarly in *Hawkins v. Frick-Reid Supply Corporation*, 154 F.2d 88, 89 (5th Cir. 1946) the Fifth Circuit Court considered and reversed a summary judgment entered upon a legal theory advanced by the plaintiff where an alternative legal theory was available:

> "While the pleading appears to be somewhat confused, nevertheless, **"every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."** Accordingly, a complaint is sufficient if it sets forth facts which show that the plaintiff is entitled to any relief which the court can grant.' Keiser v. Walsh, 73 App.D.C. 167, 118 F.2d 13, 14." (Emphasis added.)

Thus, holdings of other circuits have been that a summary judgment under Rule 54(c) may not properly be granted upon one legal theory where relief for a wrong is available upon alternative legal theories. The Circuit Court's decision affirms such a summary judgment and creates conflict among the circuits.

To permit a summary judgment to be granted upon one legal theory relied upon by the plaintiff where other legal theories would provide relief is a return to the "tyranny of formalism" long ago rejected by this Court. The spirit of the federal practice is that substance prevails over form.

This case is believed to be one of the largest in the history of the United States, concerns what are believed to be the largest leases in the United States, affects millions of acres of Florida sovereignty lands, has impact upon more than Florida's leases, and has involved ten years of discovery, motion and trial preparation efforts, costing millions of dollars.

After trial was set, the District Court allowed yet one last round of motions. In the eleventh hour this technical defense attacking the form or legal theory was made by International Minerals & Chemical Corporation and accepted by the lower court while alternative legal theories were available and pointed to by Coastal. In *Foman v. Davis*, 371 U.S. 178, 183 (1962), this Court held:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities."

Erosion is the gradual, imperceptible eating away at a body of land, which while not incrementally visible, can be seen by its devastating effects. The eating away at the body of the Federal Rules of Civil Procedure and federal practice sanctioned by the Circuit Court is not only contrary to these Rules and the decisions of this Court and the Circuit Courts, but can undercut the substantive approach to resolution of controversies in Federal courts. No increment should be considered insignificant, especially one involving billions of dollars which cannot go unnoticed. There is an importance here that transcends the parties, or the other issues in the case, or even the other lessees and the millions of acres of leasehold.

CONCLUSION

Coastal Petroleum Company respectfully urges the Court to certify the uncertain and determinative question of Florida law to the Florida Supreme Court pursuant to the enabling Florida Constitution and Rules, hold this petition in abeyance pending an answer to this question, and upon receipt of the answer, grant the writ of certiorari and reverse the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and accurate copies of the foregoing have been furnished by U.S. Mail to Hume F. Coleman, Esquire, Holland & Knight, Post Office Drawer 810, Tallahassee, FL 32302, David G. Guest, Esquire, Dept. of Legal Affairs, Suite 36, 111 S. Magnolia, Tallahassee, FL 32301, and Tom Tomasello, Esquire, Dept. of Natural Resources, 3900 Commonwealth Blvd., Tallahassee, FL 32303, this 11th day of August, 1989.

_____

Attorney

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-3672

D. C. Docket No. 77-0946

COASTAL PETROLEUM COMPANY,
Plaintiff-Appellant,

THE STATE OF FLORIDA DEPARTMENT OF NATURAL RESOURCES, et al.,
Plantiffs,

versus

INTERNATIONAL MINERALS & CHEMICAL CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(April 10, 1989)

Before RONEY, Chief Judge, HILL, and FAY, Circuit Judges.

PER CURIAM:

The judgment appealed is affirmed for the reasons stated in the Final Order of the United States District Court entered in this matter on August 12, 1988 and found at ____ Fed. Supp. ____.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASEE DIVISION

COASTAL PETROLEUM COMPANY,

Plaintiff,

v. **CASE NO. TCA 77-946-MMP**

INTERNATIONAL MINERALS & CHEMICAL CORPORATION,

Defendant,

FINAL ORDER

This cause is before the Court upon the motions for summary judgment filed by International Minerals & Chemical Corporation ("IMC") based on various, alternative grounds. By order dated April 22, 1988 (doc. 652), this Court ordered supplemental briefing by the parties limited to the legal issues presented by IMC's motion for summary judgment on the ground of lack of possessory interest (doc. 549). After consideration of the supplemental memoranda of law and related exhibits, as well as all previously filed documents and exhibits in support of or opposition to summary judgment, this Court hereby GRANTS IMC's motion for the reasons discussed herein.

Factual Background

Coastal has filed a complaint for conversion (doc. 1) seeking compensatory damages in the amount of $800,000,000.00 and unspecified punitive damages. Coastal alleges that it entered into a lease agreement, Drilling Lease 224-B, under which it was given the right to explore for oil, gas and certain minerals (doc. 1, p. 2, ¶6). The gravamen of plaintiff's complaint is that defendant IMC willfully mined phosphate and uranium upon the lands leased to Coastal without permission and payment to Coastal.

In this motion for summary judgment (doc. 549), IMC contends that Coastal did not own or have a right to possession of phosphate under the terms of Lease 224-B and therefore Coastal has no cause of action for conversion against IMC for mining of phosphate. Specifically, IMC advances two arguments: (1) the lease did not give Coastal any right to phosphate; and (2) even assuming the lease did grant a right to phosphate, it conferred at most an inchoate right to explore for those minerals named in the lease and to extract them when found, which interest is insufficient to support a conversion claim.

Exploration Contract for Oil, Gas and Minerals and Option to Lease

On October 4, 1941, the Trustees and Arnold Oil Explorations, Inc. entered into an exploration contract covering not only oil and gas, but other minerals, as shown by the following provision:

> For the consideration hereinbefore named, and upon the express condition that Lessee shall have performed the work and things herein agreed to be done by said Lessee, said Trustees, in addition to the rights herein granted to explore for oil, gas and other minerals, hereby grant Lessee for the period covered by this instrument and no longer, the exclusive option to select areas within those hereinabove described and explored, and the right to receive from said Trustees oil, gas and mineral leases to be known as "Drilling Leases". . . .

(doc. 570, Attachment C). The exploration contract does not specify whether phosphate is contemplated within the "other minerals" language.

Lease 224-B Provisions

Drilling Lease 224-B as modified, leases certain areas, referred to as drilling blocks, to Coastal:

> . . . for the sole and only purpose of prospecting, drilling, mining and operating for the production of oil, gas and sulphur, laying pipe lines, building tanks, roads, power stations and structures thereon, but not including bulkheading and filling water bottoms. . . .

(doc. 1, exh. A). The lease further provides:

> In consideration of the sum hereinbefore stated, the work herein agreed to be performed, the royalties herein provided for, and all other agreements of Lessee herein contained, said Trustees do hereby grant, lease and let exclusively unto Lessee and Lessee's successors and assigns, subject to the express permission requirements herein contained, those certain areas hereinbefore described, for the purpose of drilling for and producing therefrom oil, gas, sulphur, casinghead gas and casinghead gasoline, together with rights of way and easements for roads, pipe lines, telephone and telegraph lines, tanks, power houses, stations, gasoline plants and fixtures for producing, treating and caring for such products, as well as any and all other rights and privileges necessary and incident to or convenient for the economical operation of such areas, alone or conjointly with neighboring areas, for oil, gas, sulphur, casinghead gas and casinghead gasoline.

(doc. 1, exh. A).

Discussion

In Florida, "conversion is defined as a wrongful taking of personal property with the intent to exercise an ownership which is inconsistent with the real owner's right of possession." *King v. Saucier,* 356 So. 2d 930, 931 (Fla. 2d D.C.A. 1978) (citing *Wilson Cypress Co. v Logan,* 162 So. 489 (Fla. 1935)); *Advanced Surgical Technologies, Inc. v. Automated Instruments, Inc.*, 777 F.2d 1504, 1507 (11th Cir. 1985) (conversion is "an act of dominion wrongfully asserted over another's property inconsistent with his ownership of it," citing *Belford Trucking Co. v. Zagar,* 243 So. 2d 646, 648 (Fla. 4th D.C.A. 1970)). "The essence of the tort is not the acquisition of the property; rather, it is the wrongful deprivation." *National Union Fire Insurance Co. of Pennsylvania v. Carib Aviation, Inc.*, 759 F.2d 873, 878 (11th Cir. 1985) (citing *Star Fruit Co. v. Eagle Lake Growers, Inc.*, 33 So. 2d 858, 860 (Fla. 1948)).

IMC contends that Coastal does not have a present or immediate right of possession sufficient to maintain this conversion claim. Relying primarily on *Collins v. Coastal Petroleum Company,* 118 So. 2d 796 (Fla. 1st D.C.A. 1960), Coastal argues that it has a possessory or corporeal interest under the exploration contract and lease 224-B in the unsevered minerals, including phosphate.

In *Collins,* Coastal sought a declaratory judgment defining its rights under certain leases executed by the Trustees of the Internal Improvement Fund. *Id.* at 798. Coastal asserted that the leases granted it the right to explore for and recover from certain gulf, river and lake bottoms all minerals including metallic minerals. *Id.* The *Collins* court discussed the pertinent facts as follows.

"Pursuant to the Trustees grant of authority by Chapter 20680, Laws of Florida, Acts of 1941, in 1941 the Trustees entered into a contract with Coastal's predecessor designated as "Exploration Contract for Oil, Gas and Minerals and Option to Lease." *Id.* In 1944 and 1946, the Trustees and Coastal entered into three drilling leases, designated 224-A, 224-B and 248, in which Coastal was granted the right to produce from the described areas "oil, gas and sulphur." *Id.* These drilling leases were re-executed in 1947. *Id.* In 1951,

the leases were modified by resolution to include the discovery of minerals other than oil, gas and sulphur. *Id.* at 798-99. In 1954, the Trustees attempted to modify by resolution the 1951 drilling leases to include "halite (common table salt) and other natural soluble salts, petroleum and petroleum products, gas, including petroleum, helium and rarely others such as carbon dioxide, sulphur and brines from which borax and borates, alum, epsomite and rare elements are extracted and concentrated, but said amendment did not include rutile, ilmenite, zircon and other metallic bearing minerals." *Id.* at 799-800. This resolution instigated the *Collins* lawsuit. *Id.* at 800.

In *Collins*, the court initially noted that section one of Chapter 20680 does not refer to any minerals or substances other than "petroleum oil and gas leases" but that section two authorizes the trustees to sell and convey "petroleum oil and/or gas and/or any other mineral of any other kind whatsoever. . . ." *Id.* at 801. The court also noted the limiting language in the drilling leases, to wit: "for the sole and only purpose of prospecting, drilling, mining and operating for the production of oil, gas and sulphur." *Id.* at 802. However, the court interpreted this language in the drilling leases in light of the language contained in the exploration contract referring to oil, gas and other minerals, and concluded that Coastal became legally entitled to receive mineral leases upon performing the exploration contract. *Id.*

The court reasoned that the Trustees might have insisted on a waiver or abandonment of Coastal's rights to other minerals because of its failure to timely demand leases conforming to the exploration contract. *Id.* But the Trustees did not insist on such a waiver, and thus, waived their right to assert Coastal's waiver of the right to other minerals. *Id.* The Trustees having waived this right and Coastal having relied on it by expending substantial sums in exploration of other minerals, the court concluded that the Trustees could not now repudiate their action by adopting the 1954 resolution. *Id.*

Next, the *Collins* court turned to the effect of the subsequent resolutions on the issue of metallic minerals. The court concluded that the "other minerals" language in the resolutions, particularly the resolution of 1951, was intended to "include all minerals of any kind whatsoever." *Id.* at 803.

Accordingly, the court declared the resolution of 1954 a unilateral attempt to vary the terms of the contract and, as such, void, thus leaving intact the lease agreement as modified by the 1951 resolution. *Id.* at 804.

Coastal argues that a right to hard minerals, including phosphate, was clearly granted in the lease as determined in the *Collins* decision. Coastal further asserts that other decisions, notably involving other parties, have determined that minerals were included within the leases. These other decisions were rendered in the context of condemnation or other proceedings and found minerals to be included within the particular lease construed.

IMC interprets Coastal's rights under the leases based on the plain language of those agreements. As set forth above, Lease 224-B states that it is "for the sole and only purpose of prospecting, drilling, mining and operating for the production of oil, gas and sulphur." The lease further provides that the Trustees grant, lease and let exclusively to Coastal the described areas "for the purpose of drilling for and producing therefrom oil, gas, sulphur, casinghead gas and casinghead gasoline. . . ." The 1951 resolution provided that potash and other minerals were included in Lease 224-B. The 1954 resolution limited the 1951 resolution to specifically enumerated minerals, not including phosphate.

Lease 224-B does not mention phosphate. However, the exploration contract refers to "the rights herein granted to explore for oil, gas and other minerals." Moreover, as indicated above, the statutory authority behind the exploration contract, Chapter 20680, Laws of Florida, Acts of 1941, authorizes in section one "petroleum oil and gas leases," and in section two, authorizes the trustees to sell and convey petroleum oil, gas and "any other mineral of any kind whatsoever."

As discussed above, the *Collins* court determined that a reading of the exploration contract in conjunction with the statutory authority behind it would yield an interpretation that Coastal became legally entitled to receive oil, gas and mineral leases. On the other hand, the court clearly stated that the lease taken alone without consideration of the exploration contract, would lead to the conclusion that Coastal was granted only the right to oil, gas, sulphur, and

petroleum derivatives such as casinghead gasoline. *Id.* at 802. The *Collins* court concluded that the 1951 resolution was intended to include minerals of any kind whatsoever, and that the consideration paid for the original exploration contract was sufficient to support the resolution. It is significant that *Collins* did not expressly decide that Lease 224-B initially envisioned other minerals. Rather, the *Collins* decision was based on estoppel considerations because Coastal had acted in reliance on the 1951 resolution by expending certain sums for exploration. Because of this reliance, the *Collins* court did not permit the 1954 resolution to defeat the 1951 resolution which broadly referred to "other minerals."

Turning now to the effect of the *Collins* decision on this Court, it is clear that the district courts are "bound to adhere to decisions of [Florida's] intermediate appellate courts, absent some persuasive indication that the state's highest court would decide the issue otherwise." *Studstill v. Borg Warner Leasing,* 806 F.2d 1005, 1007 (11th Cir. 1986). There is some indication that Florida's highest court would interpret Lease 224-B differently (see discussion of *Miller v. Carr, infra*). Moreover, in *Parklane Hosiery Co., Inc. v. Shore,* 99 S. Ct. 645, 649 n.7 (1979), the Supreme Court, citing *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 91 S. Ct. 1434, 1443 (1971), stated that "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." Accordingly, this Court finds the *Collins* decision is not binding on IMC since it was not a party and was not represented in the *Collins* litigation.

That determination brings this Court back to a construction of the lease anew. Scrutinizing the lease only, this Court could simply find that the lease does not mention phosphate and therefore gives Coastal no possessory right to phosphate or other hard minerals. This Court could reach the same conclusion by considering not only the lease, but the subsequent resolutions as well, because the 1954 resolution clarified the lease to include only the enumerated minerals and thus not phosphate.

Even if Lease 224-B was determined to encompass phosphate, this Court would have to determine the type of

interest conferred and whether that interest is sufficient to enable Coastal to maintain this action for conversion. Relying on the authority of *Miller v. Carr,* 193 So. 45 (Fla. 1940), IMC argues that the lease does not confer a possessory interest but only an inchoate right to explore for the minerals and to extract them when found.

In *Miller v. Carr,* 188 So. 103 (Fla. 1939), the decedent, Alonzo A. Carr, orally promised to grant to Pearl Miller and her husband by will one-half of the royalties from his oil property in Pennsylvania. *Id.* at 104. The Court addressed the issue of whether the interest in the royalties conveyed by the oil lease is personal property or an interest in land in *Miller v. Carr,* 193 So. 45 (Fla. 1940). The pertinent provision of the lease stated:

> . . . the said parties of the first part have granted, devised and let unto the party of the second part his heirs or assigns, for the purpose and with the exclusive right of drilling and operating for Petroleum and Gas for, during and until the full term of one year next ensuing the day, and year above written, with the right of renewal thereafter, so long as oil or gas shall continue to be found in paying quantities, ALL that certain tract of land. . . .

Id. at 46. The lease further provided for a forfeiture of rights in the event the party of the second part failed to perform the terms of the lease. *Id.* at 47. It is noteworthy that the Coastal lease contains similar language.

Plaintiff Miller claimed "there was a constructive severance of the oil 'in place' and title to the oil passed to the lessee and should be treated and considered the same as if it had been taken from the land before the death of Carr." *Id.* The court disagreed and instead construed the lease as passing "the right to produce oil from the land and nothing more." *Id.* The *Miller* court relied upon two Pennsylvania court decisions, *Kelly v. Keys,* 213 Pa. 295, 62 A. 911 (1906) and *Funk v. Haldeman,* 53 Pa. 229 (1866), which found that

similar leases grant only exclusive privileges to go on the land for oil prospecting, but do not grant an estate in the land or oil. *Id.* at 47-48. The *Miller* court construed the subject lease as granting only the right to produce and sever the oil from the land, and that only the amount severed actually passes under the grant.[1] *Id.* at 48.

Coastal counterargues that *Miller* is distinguishable from the instant case because Lease 224-B, unlike the *Miller* lease, conveys a corporeal interest—the right not only to go onto the land but also the right to possession of the minerals in place in the subsurface. Specifically, Coastal argues that broad application of *Miller* to this case is questionable because the *Miller* court failed to distinguish between the two different type of granting clauses found in oil and gas leases under Pennsylvania law. Coastal contends that the earlier Pennsylvania cases of *Funk* and *Kelly* contained "exclusive right" granting clauses, that is, clauses granting the exclusive right to go upon the land to take oil and gas. The *Miller* court relied on these cases in likewise finding that only an incorporeal hereditament was conveyed. However, Coastal urges, the *Miller* lease contained a "lease and let" type of granting clause. It is Coastal's contention that Pennsylvania courts construing these type of clauses have found that a corporeal interest in the land is granted supporting ejectment even though the grantee has never been in possession of the land.

Coastal advances the case of *Barnsdall v. Bradford Gas Co.*, 225 Pa. 338, 74 A. 207 (1909) to support its argument concerning the two types of granting clauses. In *Barnsdall*, the court held that a lease stating that it "grants, demises, leases and lets unto the party of the second part" certain tracts of land "for the sole and only purpose of mining and operating for oil, gas, and other minerals" creates a corporeal interest and not a mere license to enter and operate for oil. *Id.* at 208.

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[1]Courts of other jurisdictions have reached the same conclusion as that of *Miller v. Carr. E.g., Gulf Refining Co. of Louisiana v. Glassell*, 186 La. 190, 171 So. 846 (1936); *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 84 N.E. 53 (1908); *Phillips Petroleum Co. v. Mecom*, 375 S.W.2d 335 (Tex. Civ. App. 1964).

A fairly recent superior court case, *Pennsylvania Bank and Trust Co. v. Dickey,* 232 Pa. Super. 224, 335 A.2d 483 (1975), not cited by Coastal, discusses *Barnsdall* and concludes "it is not clear whether the *[Barnsdall]* court was deciding that the grantee had a separate fee simple estate in the minerals since it only had to decide, in that case, whether the grantee owned a sufficient interest in the estate to enable him to bring an action of ejectment." *Id.* at 487. Even if this Court was persuaded that the *Miller* reasoning is erroneously founded on an interpretation not applied by Pennsylvania courts, this Court is mindful that the cases relied upon by Coastal are ejectment actions to regain possession and not actions for monetary damages based on conversion, as in the instant case. Moreover, the *Dickey* case distinguishes those cases where the grantee was granted the exclusive right to remove all of the oil and gas as long as there is any to be found from those cases where the lease is for a term of years. *Id.* at 487-88. Under *Dickey,* these foregoing factual situations make a stronger argument for finding that the agreement intended to create a corporeal interest. *Id.*

In the instant case, Lease 224-B does "grant, lease and let" the certain areas described in the lease and contains language referring to an "estate." Under *Barnsdall,* this language tends to support a finding that Coastal was granted a corporeal interest (sufficient to maintain an *ejectment* action) in those lands and not a mere license to go onto the land and prospect for minerals. However, the instant case does not involve some of the more compelling facts found in *Dickey.* Lease 224-B is for a five year term subject to what appears to be automatic renewal every five years if Coastal commences drilling operations during the first five year term (doc. 1, exh. A). The lease further provides that it shall become void during any subsequent term in which Coastal does not commence or complete or does abandon the wells

(doc. 1, exh. A).[2] Unlike *Dickey,* Lease 224-B does not grant an exclusive right to all minerals as long as any are found. Further, Lease 224-B contains the following qualifying language:

> The rights of either party hereunder may be assigned in whole or in part only after written consent thereto from the Trustees is first obtained; and the provisions hereof shall extend to the successors and assigns of the parties hereto, but no change or division in ownership of land rentals or royalties, however accomplished, shall operate to enlarge or diminish the obligations or the rights of either party. Neither this lease nor the work to be performed hereunder shall in any way limit the right of said Trustees to sell or dispose of, or to lease for other purposes than those herein, any area or areas herein described or any part thereof, covered by this lease, but in case of sale, conveyance or lease by the said Trustees, such sale, conveyance or lease shall be subject to this lease.

(doc. 1, exh. A). This language tends to show that the Trustees retained a possessory interest and granted merely a license to Coastal.

This Court finds it unnecessary to consider all of the Pennsylvania state cases that conceivably could have been overlooked by the *Miller* court. Rather, this Court is compelled to follow Florida law, as embodied in *Miller v. Carr,* as

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[2]A decision rendered by another state court, *Watford Oil and Gas Co.,* 233 Ill. 9, 84 N.E. 53 (1908), held that oil and gas leases convey a freehold interest for the specific purpose of prospecting and that such purpose "becomes extinct when the purpose is accomplished or the work is abandoned." *Id.* at 54. The *Watford* lease contained a clause giving the parties the right to cancel upon the payment of one dollar. *Id.* The Court stated "a court of equity will not do a vain and useless thing by rendering a decree settling the rights of parties which one of them may set aside at his will." *Id.* Although Lease 224-B does not contain an express cancellation clause of the same type, it does provide for forfeiture of rights based on Coastal's decision to not perform the terms of the lease.

did Judge Atkins in *Coastal Petroleum Co. v. Secretary of the Army of the United States,* Case Nos. 68-951-Civ-CA and 69-699-Civ-CA (consolidated) (S.D. Fla. 1971). That case involved a construction of the rights granted to Coastal under Lease 248 which contains operative language identical to that in Lease 224-B. Judge Atkins ruled on the question of the liability of the Trustees to Coastal as follows:

> I am convinced that the law of Florida is clear and find no need to look to the law of any other state.
>
> The controlling decision is *Miller v. Carr,* 141 Fla. 318, 193 So. 45 (1940). The rule of law therein established is that a lease granting the exclusive right to drill and operate for oil, gas and other minerals is but a contract for the limited purpose specified. It passes only the right to produce oil, gas and minerals without passing any title until the subject matter is severed from the earth. The interest conveyed is not a fee simple determinable as suggested by Coastal; rather it is a grant of an inchoate heriditament.

(doc. 654, appendix tab 3). As to the issue of the more recent and inconsistent Pennsylvania law, Judge Atkins noted that the Florida Supreme Court had this caselaw before it when it rendered the *Miller* decision "thus adding emphasis to the authority of *Miller v. Carr, supra.*" *Id.*

Further support for application of *Miller v. Carr* to the instant case is found in Judge Norris's order of September 25, 1987, granting summary judgment to the plaintiff in *American Cyanamid Co. v. Coastal,* Case No. GC-G-82-2973 (In the Circuit Court of the Tenth Judicial Circuit, in and for Polk County, Florida). Citing *Miller v. Carr,* the court determined that Lease 224-B granted an inchoate right to explore for and extract certain minerals when found (doc. 653, attachment C). The court further found that any rights Coastal may have had were extinguished by the 1976 Memo-

randum of Settlement entered into between Coastal and the Trustees.[3] *Id.*

Based on the authority of *Miller v. Carr,* rendered by the highest court of this state, this Court concludes as a matter of law that, at most, Lease 224-B conveyed to Coastal the inchoate right to explore for and produce certain minerals from those lands encompassed in the lease. Coastal has neither produced minerals nor paid any royalties to the Trustees. Therefore, this Court GRANTS IMC's motion for summary judgment based on Coastal's lack of possessory interest under the lease. Because the Court finds Coastal's interest insufficient to support an action for conversion, this Court finds it unnecessary to reach the issues contained in IMC's remaining summary judgment motions.

DONE AND ORDER THIS 12th day of August, 1988.

Maurice M. Paul
United Stated District Judge

[3]Coastal argues that the 1976 Settlement Agreement between Coastal and the Trustees "makes it clear that Coastal has a sufficient interest to bring a suit to enforce its rights for conversion" (doc. 654). This Court agrees with Judge Norris's conclusion that the Settlement Agreement reduced Coastal's interest under the lease to that of a "residual royalty right owner" (see doc. 653, attachment B). Contrary to Coastal's contention, there is no language in the Settlement Agreement establishing that Coastal's working interest prior to 1976 was greater than the inchoate right to explore for and produce minerals when found.

United States Court of Appeals
For the Eleventh Circuit

No. 88-3672

D.C. Docket No. 77-0946

COASTAL PETROLEUM COMPANY,
Plaintiff-Appellant,

THE STATE OF FLORIDA DEPARTMENT OF NATURAL RESOURCES, et al.,
Plaintiffs,

versus

INTERNATIONAL MINERALS & CHEMICAL CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Florida

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Before RONEY, Chief Judge, HILL, and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: April 10, 1989
For the Court: Miguel J. Cortez, Clerk

By: David Maland
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-3672

COASTAL PETROLEUM COMPANY,
Plaintiff-Appellant,

THE STATE OF FLORIDA DEPARTMENT OF NATURAL RESOURCES, et al.,
Plaintiffs,

versus

INTERNATIONAL MINERALS & CHEMICAL CORPORATION,
Defendant-Appellee.

On Appeal from the United Stated District Court for the Northern District of Florida

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Before RONEY, Chief Judge, HILL and FAY, Circuit Judges.

BY THE COURT:

Appellant's motion to certify a question of state law to the Florida Supreme Court is denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-3672

COASTAL PETROLEUM COMPANY,
Plaintiff-Appellant,

THE STATE OF FLORIDA
DEPARTMENT OF NATURAL RESOURCES, et al.,
Plaintiffs,

versus

INTERNATIONAL MINERALS &
CHEMICAL CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC

(Opinion April 10, 1989, 11 Cir., 198__, ___ F.2d ___).

(May 15, 1989)

Before RONEY, Chief Judge, HILL and FAY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge